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JOSEPH M. DI SCIPIO

SUSAN V. SACHS
KEVIN M. GOLDBERG

SUITE 300
1920 N STREET N.W.
WASHINGTON, D.C. 20036-1622

TELEPHONE (202) 293-3860
FACSIMILE (202) 293-4827
HOMEPAGE WWW.COHNMARKS.COM

OF COUNSEL
MARCUS COHN (1913-2001)
LEONARD H. MARKS
RICHARD M. SCHMIDT, JR
JOEL H. LEVY

DIRECT DIAL: (202) 452-4810
INTERNET ADDRESS: RBJ@cohnmarks.com

June 9, 2004

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

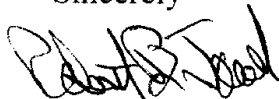
Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals II
445 - 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

95-91

Dear Ms. Dortch

On behalf of Mt. Wilson FM Broadcasters, Inc., there are herewith transmitted an original and nine copies of its "Pleading in Support of NAB."

Sincerely



Robert B. Jacobi

RBJ:btc

Enclosures

No. of Copies rec'd
List ABCDE

0+9

BEFORE THE

Federal Communications Commission

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In the Matter of)
)
Establishment of Rules and Policies)
For the Digital Audio Radio Satellite)
Service in the 2310-2360 MHz Frequency)
Band)
Radio Service Terrestrial Repeaters)
Network)

JUN - 9 2004

IB Docket No. 95-91
GEN Docket No. 90-357

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Secretary, Federal Communications Commission
Washington, D.C. 20554

PLEADING IN SUPPORT OF NAB


Mt. Wilson FM Broadcasters, Inc. filed a letter dated May 28, 2004 addressed to Congressmen Charles "Chip" Pickering and Gene Green in support of H.R. 4026 (entitled "Local Emergency Radio Service Preservation Act of 2004") introduced in the House of Representatives on March 24, 2004. The primary purpose of H.R. 4026 is to require the Federal Communications Commission to take the prescribed actions deemed necessary to preserve terrestrial radio, namely to prohibit satellite radio local programming.

The National Association of Broadcasters filed a Petition for Declaratory Ruling on April 14, 2004 pertaining to the above-referenced docket. The aforesaid May 28, 2004 Mt. Wilson letter to Congressmen Pickering and Green pertains to the same subject matter and is herewith appended for inclusion in the appropriate docket (see Appendix A).

The media press reports that thousands of letters have been filed with the FCC opposing the NAB Petition for Declaratory Ruling. Such letters have been instigated by the satellite radio providers (see Appendix B) – the same entities (or successors thereto) who stated that they would not threaten the existence of terrestrial radio stations by airing local programming and who affirmatively accepted authorizations based on such condition.

Respectfully Submitted

MT. WILSON FM BROADCASTERS, INC.

By 
Robert B. Jacobi
Cohn and Marks
1920 N Street, N.W.
Suite 300
Washington, D.C. 20036-1622
(202) 293-3860
Its Attorneys

Dated: June 9, 2004

APPENDIX A

**MT. WILSON LETTER TO CONGRESSMEN
PICKERING AND GREEN**



May 28, 2004

The Honorable Charles "Chip" Pickering
United States House of Representatives
229 Cannon House Office Building
Washington, DC 20515

The Honorable Gene Green
United States House of representatives
2335 Rayburn House Office Building
Washington, DC 20515

Dear Congressmen Pickering and Green:

I am writing in support of H.R. 4026, introduced in the House of Representatives on March 24, 2004, which has been referred to the Committee on Energy and Commerce.

Mt. Wilson FM Broadcasters, Inc. is the licensee of stations KMZT-FM, Los Angeles, California; KSUR (AM), Beverly Hills, California; and KMZT (AM), Piedmont, California. Mt. Wilson is a family enterprise, owned jointly by myself and my wife - a truly "mom and pop" operation.

Broadcasters have been concerned about the impact of satellite radio on terrestrial radio from the time that the FCC initiated satellite radio rulemaking proceedings. However, the matter of local programming did not arise until the satellite proponents proposed the use of terrestrial repeaters. Broadcasters realized that terrestrial repeaters could in fact be used to insert local programming intended for a specific community, that the impact of such local programming would further adversely affect the ability of terrestrial radio to compete and, therefore, vigorously opposed the use of terrestrial repeaters. While the FCC adopted rules and policies governing satellite radio in 1997, the matter of terrestrial repeaters was relegated to a Further Notice of Proposed Rulemaking. The Commission's decision on the "Further Notice" recognized that the ability of satellite radio to originate local programming could alter the balance in terms of evaluating the impact on terrestrial radio stations and, consequently, restrict the use of repeaters to the simultaneous transmission of programming on the main channel. Although both broadcasters and the Commission were concerned as to the impact of satellite-originated local programming via terrestrial repeaters, neither broadcasters nor the Commission foresaw the possibility of satellite local program origination utilizing the main channel.

Throughout the course of the FCC proceeding, various satellite applicants represented to the Commission that they would not originate local programming. Digital Satellite Broadcasting

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The Honorable Gene Green
May 28, 2004
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Corporation responding to an NAB pleading pertaining to the impact on terrestrial stations stated:

"Local stations will be the only means for Americans to receive local news, weather, sports and traffic conditions."

American Mobile Radio Corp., one of the two winning bidders, in Reply Comments pertaining to the further Rulemaking on terrestrial repeaters stated:

"AMRC does not contest the Commission's proposed prohibition on the origination of local programming from terrestrial repeaters."

Sirius, in its Reply Comments pertaining to a request for Special Temporary Authority to commence operations stated:

"Commenters local programming fears and concerns regarding Sirius's experimental authority are totally unfounded. Sirius will not originate local programming via terrestrial repeaters."

In granting Special Temporary Authority to both Sirius and XM, the Commission stated:

". . . the use of repeaters is restricted to the simultaneous Retransmission of programming, in its entirety, transmitted by the satellite directly to SDARS subscriber's receivers."

Like broadcasters, the Commission also was concerned that satellite local program origination could adversely impact local stations to the extent of threatening the continued existence of local radio service. The methodology of transmitting satellite local programming is irrelevant and in no way ameliorates the concern or the impact. Satellite local programming poses a genuine threat to the continued existence of terrestrial broadcasters irrespective of the method of delivery. The fact that satellite operators have found a method to circumvent the intent of the FCC rules by delivering local programming using a main channel necessitates congressional intervention.

Local radio provides programming specifically oriented to the communities of license, i.e., local news, promotion of local events (including live or taped interviews), announcements for local public service organizations and local charities, information concerning local schools (closings, etc.), local emergencies and, further are required on a quarterly basis to identify local problems and programming aired responsive to such problems - all in addition to local weather and traffic reports. Radio is a highly competitive market. The demise of even one terrestrial radio station will create a void that, pragmatically, will not be replaced by a national satellite radio system. While a national satellite system may provide limited local programming (as a sop to the FCC),

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such system reasonably cannot be expected to focus on truly local community needs and issues. Localism as provided by satellite will be a distortion of localism as that term is defined by the FCC. Localism, as the term is intended and as described above, can only be achieved by local terrestrial radio. To believe otherwise is a folly.

The plight of the "mom and pop" operators already has been jeopardized by the Commission's relaxation of the radio multiple ownership rules which, predictably, led to consolidation. Mt. Wilson finds itself competing against giants such as Clear Channel and Infinity who own or control as many as eight stations in one market. Satellite radio, with the ability to provide a hundred or more channels, is simply another giant - which now seeks to enhance its competitive position at the expense of terrestrial stations by expanding its national oriented programming to include a minimal level of local programming. "Mom and Pop" stations constitute the last remaining vestige of truly local service and these stations will find it even more difficult to compete if satellite radio is permitted to originate local programming. Indeed, as the matter now stands, nothing prevents entities such as Clear Channel and Infinity from controlling and/or participating in the ownership of satellite radio companies.

Mt. Wilson participated at all levels of the satellite radio rulemaking proceedings. "Consolidation" may be good for the "Board Room" but not good for those who believe that the diversity of voices in the marketplace is an overriding public interest concern and for the independent small radio operation. Permitting satellite radio to originate local program service of any nature and to deliver such programming by any means exacerbates the independent broadcasters' plight. The predictable demise and/or decrease of terrestrial radio - to be replaced by the localism offered by a national satellite system (and the surviving giants) will in fact result both in diminishing the diversity of voices and the quality of local programming as now provided by local terrestrial stations.

Satellite was licensed as nationwide service. Two companies are licensed to provide satellite radio service. Both XM and Sirius agreed to the principle that they would not provide local programming as an accommodation to the local terrestrial radio and, in return, received FCC authorization. Allowing the destruction of this accommodation predictably will result in the demise of the "mom and pop" stations, lessening of diversity, the lessening of truly local programming and the creation of a broadcast system controlled by two satellite companies and the remaining giants - all of whom are first and foremost responsible to stockholders, not the public interest, not to localism - except to the extent of doing the minimum to placate the FCC.

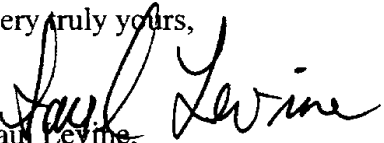
As further evidence of satellite radio's hypocrisy, it was reported, in the May 28th issue of Inside Radio, that a campaign was launched by satellite radio for subscribers to inundate the FCC with protests against prohibiting local radio programming via satellite radio. Obviously, satellite radio neglected to inform these protesters that it is breaching its representations to the FCC not to

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provide local programming which shows it was merely a deceitful attempt to mislead the FCC as to its real intentions.

Attached hereto are copies of two articles which were recently published in a Los Angeles trade press - 1) an article entitled "Why the FCC should scrap its absurd rules for satellite radio (authored by Thomas Hazlett) and 2) a reply authored by Saul Levine. A fair summary of the Hazlett article is that removing the restrictions on satellite radio will render superfluous the need for terrestrial radio and, indeed, that is the primary reason why Congress should enact the pending legislation.

Very truly yours,


Saul Levine,
President

cc: Committee on Energy and Commerce

HAZLETT ARTICLE

Sun, Mar 21, 2004 10:38 PM

From: Don Barrett <db@thevine.net>
Reply-To: "Don Barrett" <db@thevine.net>
To: <Undisclosed-Recipient:;>
Date: Friday, March 19, 2004 02:59 PM
Subject: LARP - FCC Should Scrap Satellite Radio Rules

Local Motives

Why the FCC should scrap its absurd rules for satellite radio.

By Thomas Hazlett, Slate.com, 3.19

Early this month, in a seemingly innocuous move, XM Radio offered 15 new satellite radio channels featuring local programming—traffic updates and weather reports. But because FCC rules require XM (and its rival, Sirius) to exclusively provide national programming, each of these local channels is available all across the country. An XM subscriber in Oregon, for example, can learn about a foggy night on the coast of Florida or the traffic en route to O'Hare, just by flipping the dial.

The launch of the new channels has kicked off a highly charged debate about whether the local content is legal. Traditional broadcasters claim it's not, because the programming targets particular regions. XM and Sirius (which plans similar channels) claim it is, because the programming airs nationwide. So far, the FCC seems to be siding with XM, but the regulatory scuffle points up the pickle that satellite radio is currently in: In order to get permission to exist, XM and Sirius had to swear off local content. But in order to survive, they need to find a legal way to deliver it to subscribers.

Satellite radio broadcasting was first authorized in 1997, when two licenses were issued to the companies now known as XM and Sirius. Their applications had taken seven years for the Federal Communications Commission to approve, mainly because the National Association of Broadcasters charged that the new service threatened "traditional American values of community cohesion and local identity." (It also threatened revenues. But at the time, the FCC found that traditional radio stations drew 80 percent of their income from local advertising, which suggested that national competition would not be too damaging to existing stations.) The irony, of course, was that just as lobbyists for traditional broadcasters were making arguments about the integrity of regional identity, local stations were airing more and more national programming, and companies like Infinity and Clear Channel were launching their ambitious industry consolidation. But the NAB pressure worked both to delay satellite rivals and to get the FCC to craft license rules that seemed to ensure that satellite service would air only national shows.

XM and Sirius launched service in late 2001 and early 2002, respectively, and they now serve approximately 1.8 million subscribers. Each system features about 60 channels of music and another 40 of national news, sports, public affairs, and comedy for about \$10 to \$13 per month. Equipment and installation cost an additional \$120-\$300. Analysts tout projections of 15 million customers by 2006. But success is by no means certain. Bankruptcy rumors plagued XM in 2002, and Sirius' bondholders were awarded a huge chunk of equity to stave off bankruptcy in 2003.

And so long as satellite radio omits community news, weather, traffic, and sports, its march to financial

Sun, Mar 21, 2004 10:38 PM

success will be uphill. Currently, XM and Sirius subscribers can easily flip back and forth between satellite programming and AM and FM bands. Airing local content would help bring listeners directly to satellite audio when they turn the ignition—no need to scan the AM dial for traffic updates—which would make subscribers feel they were getting more for their money and heighten their loyalty to the service. It would also—as the FCC foresaw—allow satellite radio to tap into local advertising, a potentially fat new revenue stream.

Airing local programs nationwide is a good start, but it's a remarkably inefficient solution because it soaks up precious channels—and satellite operators are allotted only so much bandwidth (12.5 MHz per operator). There are, after all, about 269 local radio markets. Squeezing an extra 15 or 20 channels onto the available bandwidth is one thing, but providing more slots for local news becomes very expensive very fast.

What makes these inefficiencies particularly grating, though, is that existing technology and infrastructure would allow scores of cities to enjoy *multiple full-time local news channels* via satellite. This smarter way to distribute local content on satellite radio would employ the repeater stations already in use. Repeaters are land-based relays that, as the name implies, pull in satellite feeds and (using the identical frequency) retransmit them. This boosts reception for area subscribers who would otherwise hit "dead zones"—tunnels, valleys, office building canyons—where signals fade. But they could also allow programs to be customized, market to market. When boosting a satellite signal, a repeater station could insert, say, a 10-minute local news bulletin into a broadcast airing on one of XM's national news channels. And it could easily supplement the range of national channels already on offer with several local ones.

The NAB attacks repeaters—even when they're used just to boost signal strength—as "a crutch for a technology that is not up to the task of providing the seamless, mobile coverage promised by proponents." And the trade press has been littered with such ominous headlines as: "NAB Accuses XM of Local Programming Plot." Capitol Hill has been happy to play enforcer. Former House Commerce Committee chairman Billy Tauzin, R-La., admonished the FCC that regulators must be vigilant in policing rules "intended to prevent companies like XM from offering localized programming like news, weather and traffic in direct competition with small radio broadcasters."

But in this era of industry consolidation, relatively speaking, there are fewer small, independent broadcasters left to protect. And the FCC's regulations, no matter what their original intent, now serve mainly to spare incumbent broadcasters—tiny or huge—the effort and expense of competing with their satellite rivals.

The notion that traditional broadcasters deliver idiosyncratic menus closely tailored to local audiences is a quaint one. Nationally syndicated content has become the order of the radio day, and satellite programming is, if anything, less cookie-cutter than its earth-bound analogs. That this debate has been framed along such outmoded lines illustrates how increasingly strained the concept of "local" has become. Regulators lacking spatial skills are charting geographic divides when they should be mapping communities of interest. Satellite radio caters to niche preferences in music or politics by connecting dispersed audiences. The opera buff in Tuscaloosa, left for deaf by "local" radio, connects with her community when tuning to satellite radio's 100 channels. To characterize satellite programs as uniform because they are nationally distributed is absurd. To then mandate that uniformity is worse.

It's only natural that sky-bound radio competitors want to offer that additional dimension—local news, weather, traffic, and sports—and they should be allowed to use repeaters to do it. Their financial success may depend on it. The earth-bound stations certainly hope that it does. That's why they are pressing so hard to see that they can't.

Sun, Mar 21, 2004 10:38 PM

Thomas Hazlett is a senior fellow at the Manhattan Institute. He formerly served as chief economist of the Federal Communications Commission.

**LEVINE RESPONSE TO HAZLETT
ARTICLE**



Where Are They
Now?

Radio Station
History

Radio Quotes

Saul Levine Launches Campaign Against National Radio Satellites Providing Local Programming



(March 23, 2004) Inside LARadio.com:

- XM's offer of 15 new satellite radio channels featuring local programming draws ire of independent owner, **Saul Levine**
- **Michael Jackson's Five**
- **JJ Jackson** memorial set for this afternoon
- Clear Channel ceo compensation doubled
- *On Air with Ryan Seacrest* set to move



LARadio.com Current News

Compiled and Written by Don Barrett

Edited by Darrell Wayne

Where Are They Now?

Archives

Current News

Radio 101

Radio

Radio Classics

Radio

Radio

Radio

Saul Levine Launches Campaign Against National Radio Satellites Providing Local Programming

(March 23, 2004) On March 19, a story titled, 'Local Motives: Why the FCC should scrap its absurd rules for satellite radio' was sent to LARP subscribers. Thomas Hazlett wrote the story and it appeared at *Slate.com*. The thrust of the article was XM Radio's offer of 15 new satellite radio channels featuring local programming — traffic updates and weather reports. **Saul Levine**, never fearful to go up against the 800-pound gorillas, responds with a strongly worded objection that will eventually be sent to the FCC.



"As one who vigorously fought the authorization of satellite radio by the FCC in the 1990s, the message conveyed by Mr. Hazlett is no surprise," wrote Saul (photo). "It was inevitable that the ill-conceived authorization of two 100 channel satellite services to provide national programming by satellite transmission would not work out. Their model, satellite television, clearly did not apply to radio. Engineers knew that the satellite service could not provide seamless reception to moving cars in an urban environment. But the advocates said they wanted to serve rural America and drives across the country where there would not be urban high rise blocking of signals."

Levine continued: "Even before launching the services, they demanded and received permission to construct an unlimited number of land based repeaters they called a 'fill-in' service. Now, we no longer have just a satellite transmitted service of 100 channels each, but a whole new radio service which is not even satellite delivered, but land based with the potential to become another AM-FM terrestrial service competing with the existing AM-FM services."

"Both Mount Wilson FM and the NAB were successful in getting the FCC to limit these so-called fill-in repeaters to do just that, i.e., fill-in the satellite transmissions. But, of course, at this point, Satellite Radio had no resemblance to satellite television, which does not utilize land-based repeaters. It becomes a 200-channel satellite and 200-channel land based monster with the ability to destroy the entire established AM-FM system of broadcasting. And, all this without hearings and rule-making to determine if it was in the public interest to do away with the traditional American system of broadcasting, which will surely result if 200 channels of land based transmitters can commence local programming in every major United States market."

"It is evident that the satellite radio operators were scheming even before commencing satellite service to establish a non-satellite, land-based system of radio broadcasting. Of course, the ill conceived satellite services are not working out financially, so now the shills will come out of the woodwork pleading that to save satellite services it will be necessary to kill off existing radio services by receiving permission to turn the 200 channels of land based repeaters into a whole other kind of animal: Surprise, a new terrestrial radio service; and none of us, the established terrestrial broadcasters, were given a chance to participate in the allocation of these land based facilities which will make the 80-90 FM allocation debacle seem like a 'walk in the park.'"

Levine concluded: "The mind boggling result of

allowing Satellite Radio to turn 200 channels of land based transmitters into a local radio service in community after community will mean the end of the American AM-FM radio service as we know it, and cause a concentration of control detrimental to the very basis of American democracy. Two companies will control radio broadcasting with 200 channels of satellite radio and 200 channels of land based transmitters. It makes our concerns about owning 8 stations in a market rather inconsequential." (Levine on right from LARP Triangle 2003)



Jackson's Five. The story by Al Martinez on **Michael Jackson** in yesterday's *LA Times* has prompted a number of emails. **Fred Lundgren**, ceo of KCAA-Riverside, said Michael could be on the air tomorrow on a barter-back agreement if he wishes. "I made the offer to him several months ago. KCAA is no KFI to be sure but, KCAA is better than his 'at-home library gig.' **Don Imus** and **G. Gordon Liddy** certainly think we are better than nothing. From my perspective, Mr. Jackson has muted himself!" replied Lundgren.

Gary Brandner of Burbank thought it wasn't too surprising that the *LA Times* would leap in to lobby for Michael Jackson. "They have always been on the same side. Michael says he doesn't understand his current unemployment. May I suggest that the cause is that people were not listening to him in sufficient numbers. According to *Times* writer Al Martinez, Jackson was swept aside by 'thundering voices of the right, a victim of the times. It is an era of Limbaugh and O'Reilly, pedantic, chest-pounding acolytes of conservatism...' Wow. Maybe those guys are closer to the public pulse than whimpering voices of the left, equivocating, tear-shedding acolytes of liberalism."

"Martinez further declares, 'Jackson never was a spokesman for any cause.' Give me a break. Mr. Martinez, please provide a list of conservative causes Michael approved, or liberal positions he opposed. And, 'If he was perceived as liberal, it was only because he wasn't obnoxious.' Gosh. **Dennis Prager**, say, would never be called obnoxious. Is he perceived as a liberal? It's too bad Michael Jackson doesn't have a job in radio, but there are many people of equal talent and intelligence who were pushed off the air for one reason or another. Glad to hear he has no financial worries. I'll bet a lot of non-working LARP would like to be in that situation. If Michael Jackson is as eager as he sounds to be back in radio, I suggest he contact the nascent Liberal network. They could probably use a 'moderate voice,'" concluded Brandner.

Stoney Richards is hoping that Michael goes with one of the Satellite Radio networks. "Wherever he goes, that's what I'm buyin'. I have always thought, and Don, you know this, that Michael is what talk show hosts should be. His agenda has always been simply the guest and the story. I still get in trouble from time to time by accidentally saying to a caller, 'how say you.' And no matter where I may be when I steal that line, I always see and hear Michael Jackson. I wish him well," wrote Richards.

"Thanks for forwarding this piece on Michael Jackson!" emailed **Greg Hardison**. "Excellent piece by one of the *Times*' [by far!] best writers. Although Michael and I had a relatively minor clash in the '80s, I've renewed my earlier great respect for him over the past 12 years. I thoroughly enjoyed 'hanging' with him at your Burbank gathering last year. As you know, I can completely relate to his misunderstanding, as to why he's not on-air now, and agree with it completely, in his own case. I suppose it's all a reflection of the way the 'biz' has become: moderate voices from both sides, such as Michael and **Ray Briam** are 'homeless,' while idiots of all stripes blather on. A bellwether of this was the replacement of an ailing Owen Spann, by far the most objective voice on ABC Talkradio, back in '88 with a brokered guy by the name of **Rush Limbaugh**. It does take one aback," concluded Greg.

Radio Stuff: Jazz fan **Doug McIntyre** couldn't make it to **Chuck Niles** service because he works all night at KABC. "However, I did play, in it's entirety, *All That Jazz* by Clark Terry and Benny Carter as a tribute...**Bobby Braswell**, California State University at Northridge basketball coach, guested with KSPN's **Joe McDonnell** and **Doug Krikorian** recently. The guys asked the coach

APPENDIX B

**XM RADIO SOLICITATION OF SUBSCRIBERS TO
CONTACT FCC AND CONGRESS**

Jun 07 04 09:04a

Tom Gammon

(770) 645-5811

Tom Gammon

From: xmsignal@xm-radio.com
Sent: Friday, May 28, 2004 1:13 AM
To: TOM@AMERICOMRADIO.COM
Subject: XM Needs Your Help! Support Satellite Radio!

XM Subscriber,

XM needs your help now. Satellite radio is under attack. The National Association of Broadcasters (NAB), the group that represents the large radio and television owners, is using its lobbyists, campaign contributions and political influence to stifle competition and stop XM from offering traffic and weather information and other valuable services to listeners like you. NAB is trying to limit XM's first amendment rights!

XM needs you to contact the FCC and your Members of Congress to tell them that you support satellite radio. Visit <http://grassroots.xmradio.com> to learn more about the threat, and how you can respond by easily contacting the FCC and your lawmakers in Washington, DC.

Exercise your freedom of expression. Let your voice be heard, loud and clear, just like XM!

- XM Satellite Radio